1990

Carolyn Crump v. Robert Crump : Brief of Respondent

Utah Court of Appeals

Robert A. Echard; Gridley, Echard and Ward; Attorney for Plaintiff/Appellant.
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NO. [redacted]

IN THE UTAH COURT OF APPEALS

CAROLYN CRUMP n/k/a CAROLYN FORSGREN,	:	Appeal No. 900362-CA
Plaintiff/Respondent,	:	
vs.	:	Priority No. 4
ROBERT CRUMP,	:	
Defendant/Appellant.	:	

BRIEF OF RESPONDENT

Appeal from First Judicial District Court
of Cache County, State of Utah
The Honorable Gordon J. Low, District Court Judge

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BRIEF OF RESPONDENT

JURISDICTION OF COURT

This Court has jurisdiction over the appeal in this matter pursuant to Section 78-2a-1 et seq. Utah Code Ann. (1953 as amended)

NATURE OF PROCEEDING

This appeal is from an Order signed by the Honorable Gordon J. Low of the First Judicial District Court of Cache County, State of Utah, denying Defendant/Appellant's petition to modify the custody decree to award him sole custody of the minor children of the parties.

STATEMENT OF ISSUES

In addition to the issues raised by Defendant/Appellant, Plaintiff/Respondent requests an award of attorney's fees and costs for responding to this appeal pursuant to Section 30-3-3, Utah Code Ann. (1953 as amended)

STATEMENT OF THE CASE

A. Nature of the Case

This appeal is from the final order of Judge Gordon J. Low in the Defendant/Appellant's Petition to Modify a Montana court order and the Plaintiff/Respondent's, Counter Petition to Modify the same order to grant her sole custody of the children, increase child support and to obtain a judgment for back child support.

B. Course of Proceeding

On August 19, 1985, the Montana District Court entered an order pertaining to the divorce of the parties and among other things awarded joint custody of the minor children to the parties with primary custody being with Plaintiff/Respondent, hereinafter "Carolyn," during the school year and secondary custody being awarded to Defendant/Appellant, hereinafter "Robert," during the summer. The court also set visitation rights and child support obligations.

In February of 1989 Robert filed the Montana custody decree in the Cache County Court Clerk's Office. Robert filed a petition to modify the custody of the children and to modify the child support award. Carolyn filed a counter petition seeking to have the joint custody of the children terminated, seeking a judgment for delinquent child support, and a modification of the child support award.

The trial started on this matter on the 24th day of April, 1990, and was continued by Judge Low to be completed on the 4th day

of May, 1990. The findings, conclusions and order entered by Judge Low in this matter were signed on the 12th day of June, 1990, and an amended order was signed on the 16th day of July, 1990. This appeal was filed on July 13, 1990.

C. Disposition at Trial Court

Judge Low denied Robert's Petition for a modification of the custody of the minor children, finding that there was no material or substantial change in circumstances justifying such a modification. The court did find a change of circumstances justifying a modification of visitation and a modification of child support. The court also granted Carolyn a judgment for delinquent child support but denied her Counter-Petition for sole custody.

STATEMENT OF FACTS

1. On August 19, 1985, the Montana District Court awarded the parties joint custody of four minor children: ROBERT RAY CRUMP, who is now 14 years of age; RONALD REED CRUMP, who is now 12 years of age; SCOTT MICHAEL CRUMP, who is now 10 years of age; and DAVID BRENT CRUMP, who is now 9 years of age.

2. A divorce decree was granted terminating the marriage of the parties on December 7, 1983, by a Montana court. However, a hearing on the custody of the children was not held until June 6, 1985. (R. 10)

3. After the divorce and prior to the hearing on custody, Carolyn moved from the State of Montana to the State of Utah. (R. Vol II, p. 10-12)

4. As a result of the hearing held by the Montana Court on June 6, 1985, the Montana Court concluded it was in the best interest of the children that primary physical custody be awarded to Carolyn and that the children's primary residence during the school year should be with their mother. Secondary custody and visitation was granted to Robert with the children's primary place of residence during the summer vacation to be with their father.

5. The Montana Court's decision was based on evidence and testimony provided at the hearing, including opinions from expert witnesses and an in camera interview with the children.

6. Judge Robert M. Holter (the Montana Judge) felt that it was in the best interest of the children they live with their mother in Utah during the school year, even though some of the children at that time were expressing a strong preference to live in Montana with their father. (See [the Montana] Court's Findings of Fact and Conclusions of Law, Addendum, Tab 1.)

7. In February of 1989, Robert filed a Petition to Modify in the First District Court, Cache County, Utah, with the Honorable Gordon J. Low presiding.

8. Following the hearing, Judge Low issued an extensive Memorandum Decision detailing his Findings of Fact from the hearing and ruling the primary custody should remain with Carolyn.

9. Judge Low's Findings are not challenged by Robert. Robert merely challenges the legal conclusions and the ultimate outcome.

SUMMARY OF ARGUMENTS

1. STANDARD OF REVIEW. Robert must show that the trial court's findings of fact are clearly erroneous in order to sustain his appeal. Robert must demonstrate that there are no facts which support Judge Low's decision. Since Robert does not challenge Judge Low's findings, the findings of fact must stand as issued in support of the Court's decision.

2. MODIFICATION OF DECREE. In order to be successful with his petition to modify, Robert must show that there has been a substantial change in Carolyn's circumstances affecting her parenting ability or the functioning of the custodial relationship. Robert must also show that the requested change of custody would be in the children's best interest. Since Judge Low has ruled that there has been no material change in circumstances and that it is in the best interests of the children to remain primarily in Carolyn's custody, Judge Low's decision must be sustained and the appeal denied.

3. FACTORS TO CONSIDER FOR CUSTODY. Judge Low reviewed all of the evidence and information presented to him in almost two days of hearing, including evidence dealing with the basic question of custody. Judge Low considered not only the desires and preferences of the children, but all other issues in determining the best interests of the children regarding custody. It is in the trial court's discretion to determine what issues have the most weight

and which issues are most important in determining the best interests of the children.

4. PROBATIVE VALUE OF EVIDENCE. The trial court has considerable discretion in determining whether proposed evidence has a significant probative value. Since Judge Low felt very comfortable with Judge Holter's previous decision and the issues presented to Judge Holter, Judge Low did not err in ruling that the partial transcript of Judge Holter's interview with the children did not have a sufficient probative value to be admitted into evidence.

5. ATTORNEY'S FEES. Although Judge Low did not award attorney's fees on the trial level, except for support Carolyn receives from her current husband, she is basically impecunious. Carolyn receives little or no support from Robert by way of child support and the child support was also substantially reduced. Carolyn should be awarded attorney's fees pursuant to 30-3-3, Utah Code Ann. The Court may also consider Robert's appeal to be frivolous.

ARGUMENTS

I.

STANDARD OF REVIEW

Robert's statement in his Brief of the standard of review is somewhat simplistic and basically incorrect. The trial court's findings of fact are presumed correct and will not be set aside without a showing that they are clearly erroneous. Elmer v. Elmer, 776 P.2d 599 (Utah 1989). Since Robert does not challenge Judge Low's findings, those findings stand.

As this Court is aware, substantial deference is extended to the trial court in domestic matters, especially when dealing with custody decisions. As stated in Maughan v. Maughan, 770 P.2d 156 (Utah App. 1989):

> Proper adjudication of custody matters is "highly dependent upon personal equations which the trial court is in an advantaged position to appraise." Smith v. Smith, 726 P.2d 423, 425 (Utah 1986) (quoting Johnson v. Johnson, 7 Utah 2d 263, 267, 323 P.2d 16, 19 (1958)). The trial court must "hear and weigh the conflicting evidence" and make findings of fact. Kramer v. Kramer, 738 P.2d 624, 628 (Utah 1987). Unless those factual findings are "clearly erroneous" under Utah R. Civ. P. 52(a), they will not be set aside on appeal. Kishpaugh v. Kishpaugh, 745 P.2d 1248, 1253 (Utah 1987). Findings of fact are clearly erroneous if it can be shown that they are against the clear weight of the evidence or that they induce a definite and firm conviction that a mistake has been made. State v. Walker, 743 P.2d 191, 193 (Utah 1987). Because the trial court is given broad discretion in making child custody awards, Myers v. Myers, 768 P.2d 979, 982-983 (Utah App. 1989), its decision will not be disturbed absent a showing of an abuse of discretion or manifest an injustice. Fontenot v. Fontenot, 714 P.2d 1131, 1132-33 (Utah 1986); Fullmer v. Fullmer, 761 P.2d 942, 945 (Utah App. 1988). This discretion is limited in that it must be exercised within the confines of the legal standard set by appellate courts, and the facts and reasons for the court's decision must be set forth in findings and conclusions. Davis v. Davis, 749 P.2d 647,

648 (Utah 1988); Kishpaugh, 745 P.2d at 1253 n. 2. 770 P.2d 156 at 159

Simply put, Robert has a very high burden to meet to convince the Appeals Court that the trial court's decision was "clearly erroneous" or was an abuse of discretion. Judge Low's Memorandum Decision and Findings in this matter are articulate, explicit, and most of all, very extensive. Robert's burden in this action is to garner all of the facts and evidence introduced in nearly two days of trial and then demonstrate that none of the facts or evidence supports the decisions and findings of the trial court.

Merely because Robert may not agree with Judge Low's decision, even if there may be facts to support Robert's position, it is not sufficient to support his appeal. If there are facts which support Judge Low's decision, that decision must be sustained.

II.

THE TRIAL COURT PROPERLY APPLIED THE STANDARD FOR CONSIDERING A MODIFICATION OF CUSTODY IN THIS ACTION.

In his arguments, Robert suggests that a modification of the joint custody award is somehow different than a modification of a normal custody award. However, the language used by the legislature in establishing joint custody awards is essentially the same as the language used by the appeals courts in Utah in considering a modification of a custody award. The standard established by the Supreme Court of Utah in Hogge v. Hogge, 649 P.2d 51 (Utah 1982), Kramer v. Kramer, 738 P.2d 624 (Utah 1987),

and Elmer v. Elmer, 776 P.2d 599 (Utah 1989), and by this court in Maughan v. Maughan, 770 P.2d 156 (Utah App. 1989), and various other cases is no different when the Court is considering a joint custody award.

Robert cites in support of his theory that Judge Low committed error in applying the standard for change of custody in a joint custody award Section 30-3-10.4 of the Utah Code. The statutory provisions for joint legal custody were initially enacted by the legislature in 1988. The modification and termination provisions are in Section 10.4, and provide as follows:

> (1) On motion of one or both of the joint legal custodians the court **MAY**, after a hearing, modify an order that established joint legal custody if:
>
> (a) the circumstances of the child or one or both custodians have materially and substantially changed since the entry of the order to be modified, or the order has become unworkable or inappropriate under existing circumstances; **AND**
>
> (b) a modification of the terms and conditions of the decree would be an improvement for and in the best interests of the child.
>
> (2) The order of joint legal custody shall be terminated by order of the court if both parents file a motion for termination. At the time of entry of an order terminating joint legal custody, the court shall enter an order of sole legal custody under Section 30-3-10. All related issues, including visitation and child support shall be determined and ordered by the Court. (Emphasis Added)

Robert suggests that Judge Low focused solely on the "changed circumstances" provision of subparagraph (a) and that Judge Low ignored the alternate provision dealing with the joint custody arrangement becoming "unworkable or inappropriate under existing circumstances." Robert apparently believes that the children's

statements to the effect that they hate their mother, hate Utah and want to live in Montana, and love their father, is a clear indication that the joint custody order is unworkable.

However, Robert fails to recognize that the statute requires **BOTH** a finding of changed circumstances or unworkable circumstances, **AND** that a modification of the terms and conditions of the decree would be "an improvement for and in the best interests of the child" as required in subsection (b). Both Judge Holter, the Montana judge, and Judge Low specifically found that it is in the best interests of the children that Carolyn be the primary custodial parent and that the children's primary residence during the school year be with their mother.

Even had Judge Low found that the joint custody order was unworkable, the award could be modified and custody granted to Robert only if Judge Low also found that such a modification would be an improvement and in the best interests of the children. It should also be noted that the statutory language for modifying the decree is still discretionary with the court, stating that the court **MAY** modify the order, not shall.

Judge Low could have also found under subsection (2) of Section 30-3-10.4 that by the Petition and Counter Petition both parties were requesting a termination of the joint custody order. Judge Low then could have granted sole custody to Carolyn with visitation to Robert. Judge Low, however, found that the current order was beneficial to the children and stated in paragraph 21 of his Memorandum Decision that "the Court further finds that the

prior joint custody situation is beneficial with respect to the summer visitation and with respect to Christmas, holidays, and other weekends, and as accessible to the Defendant."

Judge Low clearly found that the best interests of the children were served by leaving primary custody with Carolyn with summer visitation, as modified by Judge Low to provide transition time before and after summer visitation, to remain in effect.

III.

THE TRIAL COURT PROPERLY CONSIDERED ALL ISSUES IN DETERMINING WHETHER TO MODIFY THE CUSTODY AWARD.

In reviewing a previously litigated custody matter, the trial court must focus on the custodial parent's circumstances to determine if a material and substantial change in those circumstances has occured which was not contemplated in the divorce and which impacted on the custodial parent's abilities or the functioning of the custodial relationship. In this action, Judge Low determined that no material change in Carolyn's circumstances had occured and that the custodial relationship was functioning properly. In fact, Judge Low found that Carolyn's circumstances had "considerably improved." (Finding of Fact No. 3)

The law dealing with modification of custody orders has developed over the years from Hogge v. Hogge culminating most recently with Elmer v. Elmer. The Hogge case initially clarified and established the bifurcated procedures that must be followed when considering modification of custody orders. Kramer v. Kramer

clarified Hogge to the extent that the Court must initially determine whether a substantial change in the custodial parent's circumstances had occurred before the Court could reach the second tier of determining the best interests of the children. The concurring opinion in Kramer by Justices Stewart and Howe cautioned against a too-stringent following of Hogge's bifurcated procedure lest the child be locked in an undesirable custodial situation. Elmer v. Elmer further clarified Hogge and Kramer in that the changed circumstances requirement need not be as strictly followed in stipulated or non-adjudicated custody orders and that the courts could consider the changed circumstances of the non-custodial parent as well as circumstances regarding the custodial parent. Elmer v. Elmer, 776 P.2d at 605. However, Elmer additionally clarified that in contested, adjudicated custody matters, such as the original custody order in this action, the trial court must comply with Hogge's bifurcated procedures and reach a determination of changed circumstances before considering re-opening the custody order.

In the instant action, although Judge Low ultimately found that there had been no change in either of the parties' circumstances from the time of the divorce which were not contemplated at the time of the divorce, he heard almost all of the evidence the parties wished to present dealing with the issue of custody, including Robert's circumstances, testimony from one of the children, Rob, and interviews with the other children. Under

the circumstances, this was much more liberal than what would ordinarily be allowed pursuant to Elmer.

Robert's main argument on appeal is basically that the Court failed to honor most of the children's expressed desires to live with their father in Montana. Robert cites Moon v. Moon, 790 P.2d 52 (Utah App. 1990) and Paryzk v. Paryzk, 776 P.2d 78 (Utah App. 1989) in support of his position. In Moon, following a review of the various factors which can be considered in determining the "best interests" criterion, this Court stressed that:

> These factors are highly personal and individual and do not lend themselves to the means of generalization employed in other areas of the law, such as quantification in money. As an appellate court, we are limited in our institutional ability to come to grips with these considerations whereas the trial court is in a much better position to gain the necessary understanding to make the best decision possible under the circumstances. Therefore, our review of the trial court's assessment of these factors is limited, and we accord broad discretion to the trial court so that it may use its first-hand proximity to the parties to resolve the delicate and highly personal problems presented in custody disputes." [Citations Ommitted] 790 P.2d at 54, 55

The Utah Court of Appeals also recognized in Schindler v. Schindler, 776 P.2d 84 (Utah App. 1989), that "because custody determinations are so fact sensitive, there is no required set of conditions which the court must consider, but the applicability and relative weight of the various factors in a particular case lie within [the trial court's] discretion.

In Paryzk, ruling on the trial court's refusal to interview the minor child to inquire as to the child's custodial parent preference, this court stated:

> While a child's preference is a factor to be considered by the court, it is only one of several. Hutchison v. Hutchison, 649 P.2d 38, 41 (Utah 1982). Moreover, Utah Code Ann. Section 30-3-10 (1988) provides that "[t]he court may inquire of the children and take into consideration the children's desires regarding the future custody, but the expressed desires are not controlling and the court may determine the children's custody otherwise." 776 P.2d at 81.

In the present case, even though Judge Low was concerned about some of the children's stated opinion and preference to live with their father in Montana, the Court specifically found the children to be well cared for and involved in a solid, well-rounded and moral upbringing. Judge Low found their circumstances, in fact, to be improved from the time of the divorce while Robert's circumstances have somewhat degenerated. Judge Low was not persuaded that the children had been abused by their step-father or their mother. The Court found that the children live in a very stable, wholesome environment and that the children are generally satisfied in the home. The Court further found that the children have every reason to be happy either living in Lewiston with their mother or in Montana with their father, and that they were fortunate to have all of the "benefits, opportunities, and circumstances that most children would seldom hope for." The testimony of the experts further found that both of the parents were capable and fit people and that their desire for custody was based on love and concern for the children.

Judge Low also found that some of the children's expressed desire to live with their father was no different from what the

children had expressed to Judge Holter in Montana. In fact, there was extensive testimony by the oldest son that his concerns about his mother and desire to live with his father in Montana were based more on Rob's blaming the divorce on his mother and following the expressed desires of his father than on any cognitive concerns about his mother. (See R. Vol. I Pages 44 through 51.) In fact, Rob's teacher, Lorie Frischknecht, who heard him testify of his "hatred" for his mother, was "shocked" at his testimony. She had never seen Rob exhibit any concerns or express any similar types of feelings before. (See R. Vol. II Pages 130 through 131.)

Since this is an attempted modification of a previously adjudicated custody award, in determining whether there has been a change of circumstances warranting the re-opening of the child custody provisions of the divorce decree, the trial court must focus exclusively on an evaluation of the custodial parent's change of circumstances and its effect on the children. As stated in Becker v. Becker, 694 P.2d 608, 610 (Utah 1984):

> The asserted change must . . . have some material relationship to and substantial effect on parenting ability or the functioning of the **presently existing custodial relationship.** In the absence of an indication that the change has or will have such an effect, the materiality requirement is not met. Accordingly, it is not sufficient merely to allege a change which, although otherwise substantial, does not essentially affect the custodial relationship. (Emphasis Added)

In the instant action, the Court specifically found that the presently existing custodial relationship has improved, that the children are well cared for, and that there was no change in

Carolyn's parenting ability or the functioning of the custodial relationship, despite some of the children's statements to the effect that they hated their mother and desired to live with their father in Montana.

Since there is a plethora of evidence to support Judge Low's finding that the custodial parent's circumstances had not changed, and in fact had improved, and since Judge Low is in an imminently better position to evaluate the testimony of the witnesses and even statements of the children, Judge Low's Decision must be sustained and the appeal denied.

IV.

NO ERROR WAS COMMITTED BY NOT RECEIVING THE PARTIAL TRANSCRIPT FROM THE MONTANA COURT.

Robert's last issue on appeal is that Judge Low committed error in failing to receive the transcript of Judge Holter's interview with the children as part of the custody proceeding in Montana in June of 1985. Although it was not error for the Court not to receive that partial transcript into evidence, even if there were error, it would not impact the ultimate outcome of the trial, and is, therefore, harmless error.

It should be noted that Judge Low had reviewed the partial transcript of the Montana Court's interview and that Judge Low was aware of Judge Holter's interview with the children. Robert claims that had Judge Low reviewed the transcript, it would have shown that Carolyn had somehow represented to the children, and thereby

to Judge Holter, that she intended to move back to Montana. Since the Judge thought the children would be in Montana, he granted primary custody to Carolyn.

However, a review of the transcript does not reach the conclusion Robert suggests. Judge Holter made no finding in the decision issued by him that Carolyn intended to move back to Montana. In fact, it is not indicated anywhere that the Judge believed the children when they indicated that Carolyn had told them that they would be moving to Montana. It is simply an improper inference to assume that Judge Holter thought that the children would be back in Montana. And even though Judge Holter did not directly ask the children what their preference was, some of the children's desire on the matter was obvious. A good interviewer does not need to ask the question directly.

What Judge Holter found was that some of the children expressed a desire to live in Montana with their father. As Judge Low found, that situation existed at the time of the original custody hearing and continued for the next following five years. In other words, the circumstances have not changed in the children's expressions of their preference to live in Montana, although the second oldest, Ron, has stated he wishes to live with his mother. However, in spite of the children's expressed preference, both Judge Holter and Judge Low found it to be in the children's best interests to live with their mother as the primary custodial parent.

Judge Low specifically ruled that the transcript as presented in evidence may not be probative or persuasive. (Record Vol. III pages 11 through 14.) Judge Low did not exclude the partial transcript because it was not relevant, but because it had no impact on the issues before the Court. Judge Low said, "I think its admissible under [Rule] 403. The probative value is insignificant. For that matter, I just don't know it would be of any value at all either way, in light of the fact - - particularly in light of the fact that I have interviewed the children myself." (R. Vol III p. 13, ln 5-9.)

The court is granted great deference in determining what evidence is relevant and what the court determines would have a tendency to make the existence of a fact more or less probable. Ostler v. Albania Transfer Co., 781 P.2d 445 (Utah App. 1989). The appellate court should not overturn a trial court's evidentiary ruling under this rule absent a clear abuse of discretion. To constitute an abuse of discretion, the ruling must have been harmful error. State v. Dibello, 780 P.2d 1221 (Utah 1989).

In fact, since Robert was only offering a partial transcript, the Court was disadvantaged in not being able to review the entire transcript and may have only been receiving those portions favorable to Robert when other portions favorable to Carolyn may have been excluded.

In any event, even if a technical error may have been committed by Judge Low, any such error would have no impact on the

ultimate decision and must be considered harmless error (case citation).

V.

RESPONDENT SHOULD BE AWARDED ATTORNEY'S FEES.

In his ruling on attorney's fees, Judge Low found that "neither party is in a financial position to assist the other in payment of attorney's fees as the finances of the parties do not provide for the same." Judge Low also felt that neither party's actions were unwarranted and, therefore, did not award fees or costs. Although this Court has generally held that attorney's fees on appeal are generally awardable if attorney's fees were awarded on the trial level, Carolyn believes that Judge Low's Memorandum Decision was so clear and distinct as to make Robert's appeal unwarranted.

Carolyn is not currently employed and relies on what little child support is received, (a judgment was entered for delinquent child support in the amount of $4,421.00), and her current husband's income. For purposes of child support, however, Judge Low imputed minimum wage to Carolyn, for an imputed income of $667.00. Regarding the parties' incomes, Judge Holter originally found:

> 5. The father is a dairy farmer. He has had considerable economic problems but continues to try to keep his farm as a viable unit. The dairy farmer either takes all of the work day for a father no provides adequate income. Father does not have other employment or other income. He is an able-bodied person as is mother.

6. Mother has experienced dire financial circumstances since moving to Utah. Her employment is as a cook in the Cache County Jail, works 6 hours a day, starting at 5:30 a.m. She is able to arrange her schedule to be at home when the children leave and come from school. She is well respected as a worker and has excellent performance ratings. The children and mother work at various farm chores on nearby farms in exchange for money or produce.
7. In the 12 months preceding this custody hearing, father paid mother $576.00 as child support. This is inadequate and has reduced mother and children to the poverty level.
8. Mother's expenses exceed her income. Her financial situation is worsening because $300.00 child care expense will no longer be paid by the State of Utah. In their present situation, the children are well cared for and have a good relationship with the mother. Apparently the father cares for them and they have a good relationship with him too. His lack of effort in regard to their economic welfare raises the doubt as to his sincerity.

Without her current husband's income, since she continues to receive no support from Robert, Carolyn would be essentially impecunious. Judge Low found that, "the anticipation is that 1990 should be a year resulting in a net income [for Robert]." (Finding of Fact No. 25)

In Ostler v. Ostler, 789 P.2d 713, (Utah App. 1990), this Court awarded attorney's fees on the basis that Mrs. Ostler was impecuneous. This Court is also authorized an award attorney's fees pursuant to Utah Code Annotated Section 30-3-3 (1989). Burt v. Burt, 145 Utah Adv. Reports 29 (Utah App. 1990), reviews the cases awarding attorney's fees on appeal when the appeal is frivolous.

Should this Court find that the appeal was not warranted, even though Robert may not be in the best financial position to assist with attorney's fees, neither is Carolyn in a financial position to

respond and had no choice but to respond to the appeal and this Court should award her attorney's fees and costs.

CONCLUSIONS

Although Robert believes that the testimony presented favors his Petition to Modify, Robert has not met his burden on appeal of showing that Judge Low's decision was clearly erroneous and is not supported by any evidence. Clearly, there is substantial evidence which supports Judge Low's decision to leave the joint custody order intact with some modification of the visitation provisions. Judge Low specifically found that it was in the best interests of the children, in spite of any claims to the contrary, for the children to remain in the primary custody of their mother, with substantial visitation with their father.

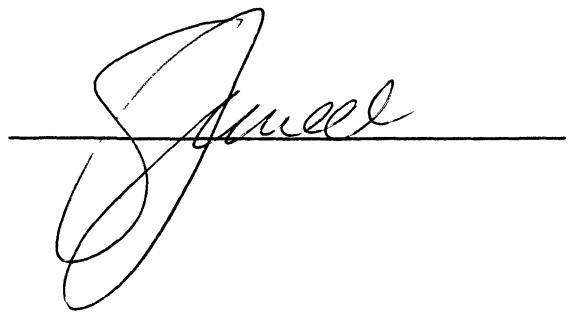
As such, Respondent respectfully requests this Court to dismiss the appeal and affirm the decision of the trial court, with an award of costs and attorney's fees in her favor.

RESPECTFULLY SUBMITTED this 10 day of April, 1991.

Stephen W. Jewell
Attorney for
Plaintiff/Respondent

CERTIFICATE OF MAILING

I hereby certify four (4) true and correct copies of the foregoing BRIEF OF RESPONDENT were mailed, postage pre-paid, this 10 day of April, 1991, to Robert A. Echard, Attorney for Defendant/Appellant, at 635 - 25th Street, Ogden, Utah 84401.



ADDENDUM

TAB 1. COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW, from Montana Court, dated August 19, 1985

TAB 2. MEMORANDUM DECISION of Judge Gordon J. Low, filed May 16, 1990

TAB 3. AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW, of Judge Gordon J. Low, filed July 16, 1990

TAB 4. AMENDED ORDER, of Judge Gordon J. Low, filed July 16, 1990

TAB 1. COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW, from Montana Court, dated August 19, 1985

IN THE DISTRICT COURT OF THE TWENTIETH JUDICIAL DISTRICT
OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LAKE

* * * * * * * * *

IN RE THE MARRIAGE OF	)	
	)	
CAROLYN CRUMP,	)	No. DR-83-227
	)	
Petitioner,	)	COURT'S FINDINGS OF FACT
	)	AND CONCLUSIONS OF LAW
and	)	
	)	
ROBERT CRUMP,	)	
	)	
Respondent.	)	

* * * * * * * * *

The issues of permanent custody, child support and attorney's fees were heard by Robert M. Holter, District Judge, on June 6, 1985. The Court heard testimony and interviewed the parties' four minor children. The Court now makes the following:

FINDINGS OF FACT

1. The marriage of the parties was dissolved by decree of this Court on December 7, 1983. Petitioner has resumed using her former name of Carolyn Holyoak. From this point herein, the parties shall be referred to as "father" and "mother". The parties by agreement disposed of their property and marital debts which was approved by supplemental decree on April 6, 1984.

2. The parties' children are Robert Ray Crump, born February 25, 1976, Ronald Reed Crump, born May 18, 1977, Scott Michael Crump, born July 22, 1979, and David Brett Crump, born October 23, 1980. The four children have lived with their mother in Utah since September, 1983. They are in good health. They show no signs of abuse or neglect. Their main living experience before moving to Utah was in rural Montana, living on a dairy farm. They now reside in a rural area in Utah.

3. Mother works; while at work she has a babysitter who is a State-licensed daycare provider. The babysitter lives in the other part of the duplex in which moter and the children live.

4. The children visit Montana in the summer, for Christmas and other times. While in Montana they reside on their father's farm and visit close by relatives.

5. Father is a dairy farmer. He has had considerable economic problems but continues to try to keep his farm as a viable unit. The dairy farm neither takes all of the work day for father nor provides adequate income. Father does not have other employment or other income. He is an able bodies person as is mother.

6. Mother has experienced dire financial circumstances since moving to Utah. Her employment is as a cook in the Cache

21-021-435

County Jail, working six hours a day, starting at 5:30 a.m. She is able to arrange her schedule to be at home when the children leave and come from school. She is well respected as a worker and has excellent performance ratings. The children and mother work at various farm chores on nearby farms in exchange for money or produce.

7. In the twelve months preceeding this custody hearing, father paid mother $576.00 as child support. This is inadequate and has reduced mother and the children to the poverty level.

8. Mother's expenses exceed her income. Her financial situation is worsening because $300.00 child care expense will no longer be paid by the State of Utah. In their present situation, the children are well cared for and have a good relationship with the mother. Apparently the father cares for them and they have a good relationship with him too. His lack of effort in regard to their economic welfare raises a doubt as to his sincerity.

9. Both parents are members of the LDS church. They are committed to their church and the Mormon Community. They wish their children raised in the Mormon Church. Mother's church calling is t-o do scouting work with children.

10. The school-age children are performing adequately in school. They appear to be well adjusted and integrated into the Utah school.

11. Father has evidenced problems because he did not believe the marriage to be broken. This made meetings between the parties awkward, unpleasant and distressing. Mother now has a relationship with a man in the state of Utah who gets along well with the children. Father has negative feelings about this. In spite of their parents attitude towards each other, the children maintain affection for their father, his farm, and for their mother. It is desirable for the boys to have contact with their father and with the farm.

12. Both parties desire custody of their children.

13. The housing that mother provides for the children on her income is not appealing to the children. This contributes to the oldest son's preference for Montana over Utah. In addition to contact with their parents, the boys have a close relationship with their grandparents who live near St. Ignatius. It would be desirable for them to spend their summers in Montana with their father and near their grandparents.

14. Father has the ability to earn greater income than at present. He does not. Mother is earning to her full capacity. She has been providing primary support for the children during the past year and a half. Her employer provides medical insurance which covers the children.

15. It is in the best interests of the children that they remain living together. Their school year should not be interrupted. They should spend their school year with their mother and the entire summer with their father. It is in their further best interests that their parents be granted joint custody. Primary residence shall remain with the mother for the school year and primary residence for the summer months with

21-021-436

their father. Visitation back and forth during times of primary residence shall be upon a reasonable and practicable basis.

16. The Court took into consideration the statements of the children as to where they wished to live. It must be observed that their most recent experience before the Court's interview was living at their old home in Montana among extended family members. While their stated prference was to live all of the time in Montana, that was conditioned upon the presence of mother. In spite of their stated wishes, it would appear that the plan set out here to be the more practical solution.

17. Respondent is capable of paying $125.00 per month per child for the support of the children while they are in the care of mother during the nine months school year. This is a sum which is considerably less than the requirement, but is conditioned upon the ability of the father to pay and the continued contribution of mother. No contribution should be paid by mother to father for the care of the children by him during the three month summer vacation because the Court has reduced the amount of monthly support during the school season so as to not require such exchange.

18. The economic conditions of the parties just does not leave room for payment of attorney's fees by father. It is noted mother has paid $913.00 on her fees and her attorney claims $1,200.00 more. This case has resulted in fees far beyond the ability of either party to pay.

CONCLUSIONS OF LAW

From the foregoing, the Court concludes:

1. That it is in the best interests of the minor children of the parties that they be placed in the joint care, custody and control of both parties. It is in their further best interests that they have primary residence during the school year with their mother, Carolyn Holyoak and during the summer vacations with their father, Robert Crump. It is in their further best interests that liberal and substantial visitation be granted back and forth during the period of primary residence.

2. That Robert Crump is capable of providing the sum of $125.00 per month, per child for the months of September, October, November, December, January, February, March, April and May of each school year. Such payments shall be made through the Clerk of the District Court, Lake County Courthouse, Polson, Montana. It shall be deemed a contempt of this Court for Robert Crump to make direct payments or for Carolyn Holyoak to receive payments which are not made through the office of the said Clerk of Court.

3. Carolyn Holyoak shall carry medical and health insurance on the children as long as the same is reasonably available through her employment. Robert Crump shall pay all medical, dental and optical expense not covered by Carolyn Holyoak's insurance policy.

21-021-437

JUDGMENT

THE COURT ORDEREDS:

1. Custody in this matter shall be jointly shared by the parties with primary residence of the children during the school year with Carolyn Holyoak, their mother, and primary residence of the children during the summer vacation with their father, Robert Crump.

2. Robert Crump shall pay the sum of $125.00 per month per child, child support, payable through the Clerk of the District Court, Lake County Courthouse, Polson, Montana. Neither Robert Crump shall make, nor Carolyn Holyoak shall receive, payments other then has paid through the Clerk of Court.

3. Carolyn Holyoak shall provide medical insurance for the children as long as the same is reasonably available through her employment; Robert Crump shall pay all medical, dental, optical and drug costs over and above that provided by the policy of medical insurance.

DATED August 19, 1985.

ROBERT M. HOLTER
District Judge

copies: Dierdre Boggs
Keith W. McCurdy
8/19/85

21-021-438

TAB 2. MEMORANDUM DECISION of Judge Gordon J. Low, filed May 16, 1990

LOGAN DISTRICT

IN THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF CACHE
STATE OF UTAH

MAY 16 1 00 PM '90

CAROLYN CRUMP, Plaintiff vs. ROBERT CRUMP, Defendant	MEMORANDUM DECISION CIVIL NO. 890000170

THIS MATTER came on before the Court for trial on the Defendant's Petition for Modification of the Divorce Decree. The Plaintiff filed a Counter Petition and the issues raised in the two (2) Petitions involve custody, visitation, child support (both currant and deliquent) and attorneys fees.

CUSTODY

1. On the 19th day of August, 1985 the Parties were awarded by the Montana Court joint custody of the Partie's minor children with the primary place of residence and primary physical custody thereof being placed with the Plaintiff. Visitation was extensive providing that the primary residence of the children, in the summer months, be with the father and other visitation upon a reasonable and practical basis.
2. That reasonable and practical basis as defined by the Montana Court and it has included weekend visitation as often as every other week, Christmas time and other occasions.

NUMBER 89-178-53
FILED
MAY 16 1990

3. There have been a number of changes occur since the 1985 Montana Decree, most of which would be expected with the passage of time. The Plaintiff's home and living conditions have considerably improved. The Defendant's are essentially what they were in 1985, though he has personally had two (2) marriages intervene and the financial concerns continue although there is anticipation for an improvement in the near future.
4. The Plaintiff has remarried Mr. Larry Forsgren and that union has resulted in the birth of two (2) children. Mr. Forsgren also has two (2) children that live in the family unit now located in Lewiston, Utah which makes a total of eight (8) children. There is apparently an expectation in the reduction of that number as a result of an anticipated marriage in the near future.
5. The Defendant has alleged that the Plaintiff's current husband has physically abused the minor children. There was scant evidence related thereto which included some phonographs, but the Court felt that the testimony in that regard was less than entirely persuasive.
6. The Defendant alleged that there have been moves by the Plaintiff during the five years and that the same has been disruptive to the children's school attendance and causes insecurities and

other problems for the children. The Court finds in that regard there have been moves, ultimately resulting in an improved situation, and not necessarily the cause of alleged problems at school. Further, the Court finds that the children appear to be doing well in school, although not entirely without some difficulty, some of the children are doing better than others.

7. The Defendant has further alleged that the Plaintiff has substantially interferred with the visitation and communication between the children and the Defendant. The Court has reviewed the testimony and evidence pursuant to that issue together with the numerous letters and other documents in the file related thereto and finds that the Parties have been less than entirely cooperative in this regard and should be reminded that the major concern of the Court which should be the major concern of the Parties, is that visitation is for the children's benefit and welfare and should be maintained in a mature and responsible manner. The obligation will fall upon both Parties to reach that result.

8. The Court interviewed the children individually in Chambers except for the oldest, Robert, who testified in open court. The expressed desire of Rob, Scott, and Brett was, without question, that they wanted to live with their father and that

they were having problems with their mother. The depth of those problems were reflected in Rob's testimony and Exhibit #2. With respect to Ron, he stated that he wants to stay where he is and felt that the spliting the custody of the children would not be a substantial problem. The Court also had the benefit of expert testimony and reports in this issue, though none of those reports, in the Court's estimation, were entirely comprehensive. In addition to those, which will be addressed hereafter, the Court had access to Exhibit #25 which was a custody assessment done for the 1985 Montana proceeding. Based thereon and based upon the testimony and evidence, here, this Court finds no inability in either parent to provide for the needs of the children. Both appear to have prerequisite abilities and desire for custody

9. The depth of the desire of the three (3) children, Robert, Scott, and Brett, to live with their father is unusual indeed, but is not inconsistent with their expressed desire in 1985. Of all the factors to be considered in this regard the desire of the children is the most troublesome to the Court. The experts opinions, though not based upon as much information as the Court would desire, generally line up on the side of the Party requesting the same. Dr. Janiak and Price recommend custody to

the Plaintiff, Dr. Bollinger and Loosle on the side of the Defendant.

10. The desires of the children in the 1985 hearing were expressed to the Montana Judge and the same found that despite those expressed desires that the children's interests would be best met if they lived with the Plaintiff.

11. This Court finds that the children live in a very wholesome environment with the present custodial situation and on the same token finds nothing adverse should custody change to the Defendant as the Montana situation provided by the Defendant appears likewise to be a wholesome environment for the children.

12. In that regard it should be noted that the grandparents on both sides reside in Montana close to the Defendant's residence and would be accessible to the children for support, and care and in establishing and improving the relationship between the grandparents and the children.

13. The children expressed that they do not get along particularly well with the step-father and he has pulled their hair and otherwise caused them physical abuse. The Court indicated the evidence thereon was likewise not entirely persuasive.

14. The Court feels that the evidence supports the finding therein that the home is not <u>always</u> a happy home in which they live. There is stress and sometimes

anger, but is not unusual in such a situation.

15. There are step-children in the home, both older and younger than the children here involved and the Court does not find that that adversely affects the home environment.

16. The Court finds that the children would benefit by living with their father, that their relationship would be enhanced and that four (4) boys on a Montana ranch would be a wholesome, beneficial environment for the boys. On the same token the Court finds that the environment which they now live in in Lewiston with access to the Forsgren ranch in Idaho is not dissimilar to the Montana opportunities.

17. The boys appear to be good boys, well cared for and are involved in a solid, well rounded, moral up bringing, though as indicated they express unhappiness where they now live. The evidence and circumstances presented to the Court would certainly suggest that they have every reason to be happy and would be happy either living in Lewiston with their mother or in Montana with their father. The children are indeed fortunate in that they have all of the benefits, opportunities and circumstances that most children would seldom hope to have. Fortunately, in this situation they would have similar circumstances with their father or their

mother. That appears to make it difficult for them to be happy with one or the other. This Court saw nothing in the testimony and evidence to suggest that the findings of the experts were based on erroneous information. The parents both seem to be very capable and loving, though react adversely under stress and that is not entirely inconsistent with capable parenting.

18. The Defendant has demonstrated an intense and continued interest in visitation as he travels over 500 miles to effectuate the visitation, sometimes as often as twice a month with the expenditure of many hundreds of dollars for each visitation.

19. There have been problems in visitation though there have been periods when it appears that the problems have been minimal and the Court finds that most of those problems could be resolved by both parents setting aside their personality conflicts in this matter and working toward the good of the children and with an aim of complying with the terms and provisions of the Court Orders.

20. The Court finds in that regard that there has been a demonstrated lack of goodwill in this

case resulting most likely from frustration which each Party has experienced over the actions of the other. The parents should work together for the best benefit of the children.

The Findings of the Montana Court provide that the child support payments should be paid to the Clerk of the Court and this Court will abide by that Order in compiling the child support due and owing.

21. In recent cases issued by the Utah Court of Appeals and the Supreme Court were listed factors to be considered in these cases and the Court has taken into consideration each of those factors together with those found in Section 30-3-10 (1989), U.C.A. Paramount in all of those cases and in the statute is the best interest of the children. Individual factors influencing that finding have been addressed above by this Court and considered at length. As above indicated the most troubling factor of them all is the strong desire of three (3) of the children to live with the father. That same factor was before the Montana Court and like that Court this Court feels that despite that desire and despite the age of the children involved, particularly the oldest, and even recognizing their relative ability to evaluate the custodial question, this Court finds that the best interests of the

children will be met if the custody remain with the mother. The Court further finds that the prior joint custody situation is beneficial with respect to the summer visitation and with respect to Christmas holidays and other weekends and as accessible to the Defendant.

22. The Petition therefore with respect to the change of custody is denied.

23. However, with respect to visitation, it would appear beneficial to this Court that some modification be made thereto. Overall the Court finds there has not been a substantial material change in circumstances warranting a change in custody, that most of the changes that have occurred have not been of the sort that would require or indicate the necessity of a modification. Most of them have been the kind that are expected through the passage of time and there certainly is nothing shown to be determential in a material way in the children's present custodial situtation, nor which would be more adventageous to the children if the custody should be changed. In saying this the Court is not insensitive to the desire of the children, particularly that of the older children, but that is one of the many factors that must be considered.

24. It would appear beneficial to this Court and the Court so orders that the summer visitation be modified slightly in that summer

visitation or change of the residence will not begin until the third day after school is terminated in the spring and will conclude one (1) week before school starts in the fall.

25. With respect to the issue of child support, the testimony before the Court was that the farming operation in Montana has been unprofitable and that in fact that in 1989 it was operated at a loss. Expectations are that it will improve in the future, but in any event, it would appear that the Defendant's income is presently at a negative. The anticipation is that 1990 should be a year resulting in a net income, for purposes of determining child support, at approximately $900.00 per month. The uniform child support guidelines are not easily applicable with respect to farm income as they are with wages, as farm income as with other business is defined entirely different and what may be gross income of a substancial amount may result in a net loss, not only in an operating loss, tax loss, but an actual loss. Despite that, many of the benefits purchased for or considered to be farm expenses and not easily construed to be as income though they provide the same kind of benefits for people on a wage income buys and from which a gross income from child support is calculated. In any event, this Court finds that income for purposes of determining

child support on the part of the Defendant is $737.00 and on the part of the Plaintiff $667.00 (imputed) and child support is to be determined pursuant to the uniform guidlines on that basis. As to delinquent child support, the Court finds that after analyzing the clerks records and those of the Defendant, they are consistant and the deliquency is $4,421.00 to May 1, 1990. Judgement should enter for that sum.

26. This Court finds that neither Party is in a financial position to assist the other in payment of attorney's fees as the finances of the Parties do not provide for the same. Further, that these are issues that needed to be litigated that neither Party was unwarranted in bringing or defending the Petitions and therefore each Party is ordered to pay their own fees and costs. Counsel for the Plaintiff is directed to prepare a formal Order in conformance herewith.

Dated this 16th day of May, 1990.

BY THE COURT

Gordon J. Low
District Court Judge

COPY OF THE ABOVE MAILED TO
Linda Crump P.O. Box 1550 Ogden
Jeffrey Crump 667 E. 100 N. Ogden
THIS 16 DAY OF May 90

DEPUTY

-87

TAB 3. AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW, of Judge Gordon J. Low, filed July 16, 1990

Jeffrey "R" Burbank 3918
JENKINS AND BURBANK
67 East 100 North
Logan, Utah 84321
Telephone: (801) 752-4107

IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY
STATE OF UTAH

CAROLYN CRUMP, now known as CAROLYN FORSGREN, Plaintiff, vs. ROBERT CRUMP, Defendant.	AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW Civil No. 890000170

The above-entitled matter came on regularly for a hearing on the 24th day of April, 1990, and was continued and finalized on the 4th day of May, 1990. The Honorable Gordon J. Low presided. Plaintiff appeared in person and by and through her attorney Jeffrey "R" Burbank of JENKINS AND BURBANK. Defendant appeared in person and by and through his attorney Robert Echard of GRIDLEY, ECHARD & WARD. A trial was had in the above-referred to matter lasting one day and a half. Testimony was heard from the Plaintiff, the Defendant and various witnesses for both sides. The Court having heard the testimony of the Plaintiff and Defendant and of the other witnesses and good cause appearing makes the following:

FINDINGS OF FACT

1. On the 19th day of August, 1985, the parties were awarded by the Montana Court joint custody of the parties' minor

(6)

children with the primary place of residence and primary physical custody thereof being placed with the Plaintiff. Visitation was extensive providing that the primary residence of the children, in the summer months, be with the father and other visitation upon a reasonable and practical basis.

2. That reasonable and practical basis as defined by the Montana Court and it has included weekend visitation as often as every other week, Christmas time and other occasions.

3. There have been a number of changes occur since the 1985 Montana Decree, most of which would be expected with the passage of time. The Plaintiff's home and living conditions have considerably improved. The Defendant's are essentially what they were in 1985, though he has personally had two (2) marriages intervene and the financial concerns continue although there is anticipation for an improvement in the near future.

4. The Plaintiff has remarried Mr. Larry Forsgren and that union has resulted in the birth of two (2) children. Mr. Forsgren also has two (2) children that live in the family unit now located in Lewiston, Utah which makes a total of eight (8) children. There is apparently an expectation in the reduction of that number as a result of an anticipated marriage in the near future.

5. The Defendant has alleged that the Plaintiff's current husband has physically abused the minor children. There was scant evidence related thereto which included some photographs,

but the Court felt that the testimony in that regard was less than entirely persuasive.

6. The Defendant alleged that there have been moves by the Plaintiff during the five years and that the same has been disruptive to the children's school attendance and causes insecurities and other problems for the children. The Court finds in that regard there have been moves, ultimately resulting in an improved situation, and not necessarily the cause of alleged problems at school. Further, the Court finds that the children appear to be doing well in school, although not entirely without some difficulty, some of the children are doing better than others.

7. The Defendant has further alleged that the Plaintiff has substantially interfered with the visitation and communication between the children and the Defendant. The Court has reviewed the testimony and evidence pursuant to that issue together with the numerous letters and other documents in the file related thereto and finds that the Parties have been less than entirely cooperative in this regard and should be reminded that the major concern of the Court which should be the major concern of the Parties, is that visitation is for the children's benefit and welfare and should be maintained in a mature and responsible manner. The obligation will fall upon both parties to reach that result.

8. The Court interviewed the children individually in Chambers except for the oldest, Robert, who testified in open

court. The expressed desire of Rob, Scott, and Brett was, without question, that they wanted to live with their father and that they were having problems with their mother. The depth of those problems were reflected in Rob's testimony and Exhibit #2. With respect to Ron, he stated that he wants to stay where he is and felt that the splitting the custody of the children would not be a substantial problem. The Court also had the benefit of expert testimony and reports in this issue, though none of those reports, in the Court's estimation, were entirely comprehensive. In addition to those, which will be addressed hereafter, the Court had access to Exhibit #25 which was a custody assessment done for the 1985 Montana proceeding. Based thereon and based upon the testimony and evidence, here, this Court finds no inability in either parent to provide for the needs of the children. Both appear to have prerequisite abilities and desire for custody.

9. The depth of the desire of the three (3) children, Robert, Scott, and Brett, to live with their father is unusual indeed, but is not inconsistent with their expressed desire in 1985. Of all the factors to be considered in this regard the desire of the children is the most troublesome to the Court. The experts opinions, though not based upon as much information as the Court would desire, generally line up on the side of the Party requesting the same. Dr. Janiak and Price recommend custody to the Plaintiff, Dr. Bollinger and Lossle on the side of the Defendant.

10. The desires of the children in the 1985 hearing were expressed to the Montana Judge and the same found that despite those expressed desires that the children's interests would be best met if they lived with the Plaintiff.

11. This Court finds that the children live in a very wholesome environment with the present custodial situation and on the same token finds nothing adverse should custody change to the Defendant as the Montana situation provided by the Defendant appears likewise to be a wholesome environment for the children.

12. In that regard it should be noted that the grandparents on both sides reside in Montana close to the Defendant's residence and would be accessible to the children for support, and care and in establishing and improving the relationship between the grandparents and the children.

13. The children expressed that they do not get along particularly well with the step-father and he has pulled their hair and otherwise caused them physical abuse. The Court indicated the evidence thereon was likewise not entirely persuasive.

14. The Court feels that the evidence supports the finding therein that the home is not <u>always</u> a happy home in which they live. There is stress and sometimes anger, but is not unusual in such a situation.

15. There are step-children in the home, both older and younger than the children here involved and the Court does not find that that adversely affects the home environment.

16. The Court finds that the children would benefit by living with their father, that their relationship would be enhanced and that four (4) boys on a Montana ranch would be a wholesome, beneficial environment for the boys. On the same token the Court finds that the environment which they now live in in Lewiston with access to the Forsgren ranch in Idaho is not dissimilar to the Montana opportunities.

17. The boys appear to be good boys, well cared for and are involved in a solid, well rounded, moral up bringing, though as indicated they express unhappiness where they now live. The evidence and circumstances presented to the Court would certainly suggest that they have every reason to be happy and would be happy either living in Lewiston with their mother or in Montana with their father. The children are indeed fortunate in that they have all of the benefits, opportunities and circumstances that most children would seldom hope to have. Fortunately, in this situation they would have similar circumstances with their father or their mother. That appears to make it difficult for them to be happy with one or the other. This Court saw nothing in the testimony and evidence to suggest that the findings of the experts were based on erroneous information. The parents both seem to be very capable and loving, though react adversely under stress and that is not entirely inconsistent with capable parenting.

18. The Defendant has demonstrated an intense and continued interest in visitation as he travels over 500 miles to effectuate

the visitation, sometimes as often as twice a month with the expenditure of many hundreds of dollars for each visitation.

19. There have been problems in visitation though there have been periods when it appears that the problems have been minimal and the Court finds that most of those problems could be resolved by both parents setting aside their personality conflicts in this matter and working toward the good of the children and with an aim of complying with the terms and provisions of the Court Orders.

20. The Court finds in that regard that there has been a demonstrated lack of goodwill in this case resulting most likely from frustration which each Party has experienced over the actions of the other. The parents should work together for the best benefit of the children. The Findings of the Montana Court provide that the children support payments should be paid to the Clerk of the Court and this Court will abide by that Order in compiling the child support due and owing.

21. In recent cases issued by the Utah Court of Appeals and the Supreme Court were listed factors to be considered in these cases and the Court has taken into consideration each of those factors together with those found in Section 30-3-10 (1989), U.C.A. Paramount in all of those cases and in the statute is the best interest of the children. Individual factors influencing that finding have been addressed above by this Court and considered at length. As above indicated the most troubling factor of them all is the strong desire of three (3) of the

children to live with the father. That same factor was before the Montana Court and like that Court this Court feels that despite that desire and despite the age of the children involved, particularly the oldest, and even recognizing their relative ability to evaluate the custodial question, this Court finds that the best interests of the children will be met if the custody remain with the mother. The Court further finds that the prior joint custody situation is beneficial with respect to the summer visitation and with respect to Christmas holidays and other weekends and as accessible to the Defendant.

22. The Petition therefore with respect to the change of custody is denied.

23. However, with respect to visitation, it would appear beneficial to this Court that some modification be made thereto. Overall the Court finds there has not been a substantial material change in circumstances warranting a change in custody, that most of the changes that have occurred have not been of the sort that would require or indicate the necessity of a modification. Most of them have been the kind that are expected through the passage of time and there certainly is nothing shown to be determential in a material way in the children's present custodial situation, nor which would be more advantageous to the children if the custody should be changed. In saying this the Court is not insensitive to the desire of the children, particularly that of the older children, but that is one of the many factors that must be considered.

24. It would appear beneficial to this Court and the Court so orders that the summer visitation be modified slightly in that summer visitation or change of the residence will not begin until the third day after school is terminated in the spring and will conclude one (1) week before school starts in the fall.

25. With respect to the issue of child support, the testimony before the Court was that the farming operation in Montana has been unprofitable and that in fact that in 1989 it was operated at a loss. Expectations are that it will improve in the future, but in any event, it would appear that the Defendant's income is presently at a negative. The anticipation is that 1990 should be a year resulting in a net income, for purposes of determining child support, at approximately $900.00 per month. The uniform child support guidelines are not easily applicable with respect to farm income as they are with wages, as farm income as with other business is defined entirely different and what may be gross income of a substantial amount may result in a net loss, not only in an operating loss, tax loss, but an actual loss. Despite that, many of the benefits purchased for or considered to be farm expenses and not easily construed to be as income though they provide the same kind of benefits for people on a wage income buys and from which a gross income from child support is calculated. In any event, this Court finds that income for purposes of determining child support on the part of the Defendant is $737.00 and on the part of the Plaintiff $667.00 (imputed) and child support is to be determined pursuant to the

uniform guidelines on that basis. As to delinquent child support, the Court finds that after analyzing the clerks records and those of the Defendant, they are consistent and the delinquency is $4,421.00 to May 1, 1990. Judgment should enter for that sum. Pursuant to the uniform guidelines the base child support award for the four children shall be $220.00 per month. The base amount per month per child is $55.00. The base amount per child will be reduced by 50% for each child for time periods during which specific extended visitation of that child with the Defendant is granted in the order for at least 25 of any 30 consecutive days.

26. This Court finds that neither Party is in a financial position to assist the other in payment of attorney's fees as the finances of the Parties do not provide for the same. Further, that these are issues that needed to be litigated that neither Party was unwarranted in bringing or defending the Petitions and therefore each Party is ordered to pay their own fees and costs. Counsel for the Plaintiff is directed to prepare a formal Order in conformance herewith.

From the foregoing Findings of Fact, the Court makes and enters the following:

CONCLUSIONS OF LAW

1. That it is in the best interest of all four children of the Parties to remain in the custody of the Plaintiff.

2. That the Defendant has failed to show a substantial and material change in circumstances that would justify Plaintiff's

petition to change custody.

3. The Defendant has made a sufficient showing of a substantial and material change in circumstances warranting a change in visitation only to the degree that summer visitation would be modified slightly in that summer visitation or change of the residence will not begin until the 3rd day after school is terminated in the spring and will conclude one week before school starts in the fall.

4. That the prior joint custody situation is beneficial with respect to the summer visitation and with respect to the Christmas holidays and on the weekends as assessable to the Defendant.

5. Child support shall be figured from the Defendant's income of $737.00 per month and an imputed income to the Plaintiff in the amount of $667.00 per month. The actual amount of child support to be paid shall be determined pursuant to Uniform Guidelines on that basis. Pursuant to the uniform guidelines the base child support award for the four children shall be $220.00 per month. The base amount per month per child is $55.00. The base amount per child will be reduced by 50% for each child for time periods during which specific extended visitation of that child with the Defendant is granted in the order for at least 25 of any 30 consecutive days.

6. Plaintiff is entitled to a judgment against Defendant for delinquent child support in the amount of $4,421.00 to May 1 1990.

7. Neither party is in a financial position to assist the other in the payment of attorney's fees and the issues that were litigated by the Parties was not unwarranted in bringing or defending the petition therefore each party shall be ordered to pay their own attorney's fees and costs.

8. A order modifying the Montana divorce decree shall be entered in accordance with the Findings of Fact, and Conclusions of Law is stated herein.

DATED this 16th day of July, 1990.

BY THE COURT

Gordon J. Low
District Judge

APPROVAL OF COUNSEL

Robert Echard
Attorney for Defendant

CERTIFICATE OF MAILING

I do hereby certify that a true and correct copy of the above ard foregoing was mailed postage prepaid and properly addressed to Robert Echard, Gridley, Echard & Ward, 635 - 25th Street, Ogden, Utah 84402-1850 by depositing said item in the U.S. Mail on this _ day of June, 1990.

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TAB 4. AMENDED ORDER, of Judge Gordon J. Low, filed July 16, 1990

Jeffrey "R" Burbank 3918
JENKINS AND BURBANK
67 East 100 North
Logan, Utah 84321
Telephone: (801) 752-4107

IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY
STATE OF UTAH

CAROLYN CRUMP, now known as CAROLYN FORSGREN, Plaintiff,	)	AMENDED ORDER
vs.	)	Civil No. 890000170
ROBERT CRUMP, Defendant.	)	

Good cause appearing and pursuant to the Memorandum Decision issued on the 16th day of May, 1990, by the Honorable District Court Judge Gordon J. Low and incorporated herein by this reference IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That primary custody of the four minor children shall remain with the Plaintiff.

2. The Defendant's Petition with respect to the change of custody is hereby denied.

3. That there has been no material or substantial change in circumstances shown to justify modification of custody. However, there has been sufficient showing to justify a modification in visitation.

4. It is hereby ordered that the summer visitation be modified slightly in that the summer visitation or change of the residence will not begin until the 3rd day after school is 60

terminated in the spring and will conclude one week before school starts in the fall.

5. Plaintiff shall receive a judgment against the Defendant for delinquent child support in the amount of $4,420.00 to May 1, 1990.

6. Child support shall be figured from income of the Defendant in the amount of $737.00 and imputed income to the Plaintiff in the amount of $667.00.

7. It is further ordered pursuant to the child support obligation worksheet (incorporated herein by this reference) prepared by Defendant, the base child support award is $220.00 per month. The base amount per child is $55.00 per month. The base amount per child will be reduced by 50% for each child for time periods during which specific extended visitation of that child with the Defendant is granted in the order for at least 20 of any 30 consecutive days.

8. Neither party shall be awarded attorney's fees against the other.

9. Each party shall be responsible for their own fees and costs.

DATED this 16th day of ~~May~~ July, 1990.

BY THE COURT

Gordon J. Low
District Court Judge

APPROVAL OF COUNSEL

Robert A. Echard

Robert Echard
Attorney for Defendant

CERTIFICATE OF MAILING

I do hereby certify that a true and correct copy of the above and foregoing was mailed postage prepaid and properly addressed to Robert Echard, Gridley, Echard & Ward, 635 - 25th Street, Ogden, Utah 84402-1850 by depositing said item in the U.S. Mail on this _ day of May, 1990.

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